SUPREME COURT OF THE UNITED STATES.

October Term, 1904. No. 182.

The Pennsylvania Lumbermen's Mutual Fire Insurance Company

vs.

Charles C. Meyer.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The suit was an action at law in the United States Circuit Court for the Western District of New York, brought by Charles C. Meyer against the Pennsylvania Lumbermen's Mutual Fire Insurance Company, upon a policy of fire insurance, to recover the amount of a fire loss. There was a trial without a jury, and under a decision of the court judgment was rendered in favor of plaintiff and against the insurance company for the sum of $5314.98. A writ of error was taken to the United States Circuit Court of Appeals for the Second Circuit, where, in addition to certain questions as to the merits of the con-

troversy, it appeared that the jurisdiction of the United States Circuit Court was in issue. The United States Circuit Court of Appeals, therefore, reserved judgment upon the other questions and certified the question of jurisdiction to the Supreme Court of the United States. (Record, page 1.)

The question certified is as follows:—

> "Had the Circuit Court jurisdiction of the plain-
> "tiff in error?" (Record, page 3.)

The facts certified by the court upon which the question of jurisdiction depends are as follows (Record, page 1):—

> "The defendant in error, a citizen of the State of
> "New York, recovered judgment herein against the
> "plaintiff in error, a citizen of the State of Pennsyl-
> "vania, for five thousand three hundred and four-
> "teen dollars and ninety-eight cents ($5314.98) dam-
> "ages and costs for destruction by fire of buildings
> "in Rochester, N. Y., insured by the plaintiff in
> "error.
>
> "The action was commenced in the Supreme
> "Court of the State of New York by service of the
> "summons on Samuel H. Beach at the city of Rome,
> "N. Y., a director of the company, who resided in
> "that city, and on application of the company ap-
> "pearing specially, was removed into the Circuit
> "Court because of diverse citizenship of the parties.
> "By motion, on special appearance, to set aside the
> "service, by plea, exception and assignment of error,
> "the question as to whether jurisdiction of the com-
> "pany had been obtained by such service has been
> "properly raised.
>
> "The defendant in error is, and at the time of
> "the commencement of this action was, a citizen and
> "resident of the State of New York. The plaintiff
> "in error is a fire insurance corporation organized
> "under the laws of the State of Pennsylvania and
> "its office is in Philadelphia. Written applications
> "were duly made to it for the issuance of the policies
> "in suit and were mailed from Rochester, N. Y., to
> "the company at Philadelphia, Pa. The policies

"were made out and executed by it at Philadelphia "and were sent to the insured at Rochester, N. Y., "where he received the same. All transactions be- "tween the company and said insured, subsequent "to the issuance of said policies and until after the "destruction of said property by fire, were by cor- "respondence in writing from Philadelphia to him "at Rochester, and he writing from Rochester to it "in Philadelphia.

"Three of the said company's thirteen directors "reside in the State of New York, but the only act "done by them for it is to attend from time to time "the meetings of its board of directors, which are "held in the city of Philadelphia, and there to give "such advice and take such action in connection "with its business as may seem to them proper. "They perform no duties and do no acts for the "company in the State of New York, and never "have. The company has no agents or officers "within that State and has not had at any time. "It has no office within that State, has never been "authorized or licensed by the insurance depart- "ment thereof to do business therein, and has not "taken the steps required by law for that purpose. "At the date of the service of the summons as "aforesaid the said company had and now has "about nine hundred thousand dollars ($900,000) "outstanding insurance on property within the "State of New York, which is something less than "one-third of its total risks. The applications there- "for were made by mail addressed to it at Philadel- "phia and the policies were executed and issued at "that city and sent by mail from there to the in- "sured within the State of New York.

"Ever since the plaintiff in error was incorporated "it has been engaged in the business of insuring "property located in the State of New York and "other States against loss by fire and has sent by mail "circulars from Philadelphia into said State solicit- "ing business. In the prosecution of its business "and for the purpose of increasing it, the company "sends its general manager to the different con- "ventions of lumbermen held in the State of New

"York for the purpose of urging upon those attend-
"ing upon such conventions the advantages of in-
"suring with it. It sends its adjusters into the
"State of New York when a loss by fire occurs there
"to property insured by it, for the purpose of ad-
"justing the amount of such loss. It originally
"placed insurance upon the property covered by
"the policies in question after its manager had
"pointed out the advantage of insuring in the com-
"pany, the conversation being had at the city of
"Rochester, in said State."

ARGUMENT.

In order to give a Federal court jurisdiction in a suit against a corporation foreign to the State within whose borders the suit is brought, two facts must be shown, viz. :—

First.—That the foreign corporation is carrying on business within the State.

Second.—That the corporation is properly brought into court by service upon an officer or agent who can fairly be said to be its representative agent within the State.

Both of these conditions must be shown. It is not sufficient merely to show that the foreign corporation is carrying on business within the State. It must also appear that it has been properly served.

This rule does not in any way conflict with the doctrine that a State may prohibit either absolutely or conditionally a foreign insurance company from carrying on business within the State, and may either expressly or impliedly require as one of the conditions of the license that the corporation shall consent that a certain designated agent or a certain designated officer of the State shall be the representative of the company to receive service of writs.

The mere fact, however, that a State may prohibit the foreign corporation or may impose conditions does not give the Federal courts jurisdiction in suits against such a corporation, unless the corporation is constructively within the State borders by carrying on business there and unless it is brought into court by a summons served upon its agent or officer representing it in the State.

These principles have been authoritatively settled by this court.

In the case of—

St. Clair *vs.* Cox, 106 U. S., 350,

the record of a judgment obtained in Michigan against a corporation of another State was offered in evidence in another suit to support a setoff. It appeared that the laws of Michigan authorized service upon a foreign corporation by delivering a copy of the writ to "any officer, "member, clerk or agent of such corporation." It appeared from the record that the writ was returned as served by delivering a copy within the State of Michigan to Colwell, agent of defendant. It did not appear affirmatively in the record that the corporation was carrying on business in Michigan. This court held that the record was properly excluded, saying (Mr. Justice Field delivering the opinion):—

> "Without considering whether authorizing service "of a copy of a writ of attachment as a summons on "some of the persons named in the statute—a mem- "ber, for instance of the foreign corporation, that is "a mere stockholder—is not a departure from the "principle of natural justice mentioned in Lafayette "Insurance Co. *vs.* French, which forbids condemna- "tion without citation, it is sufficient to observe that "we are of opinion that when service is made within "the State upon an agent of a foreign corporation, it "is essential, in order to support the jurisdiction of "the court to render a personal judgment, that it "should appear somewhere in the record, either in "the application for the writ, or accompanying its

"service, or in the pleadings or the findings of the "court, that the corporation was engaged in business "in the State. The transaction of business by the cor- "poration in the State, general or special, appearing, "a certificate of service by the proper officer or a per- "son who is its agent there would, in our opinion, "be sufficient *prima facie* evidence that the agent "represented the company in the business. It would "then be open, when the record is offered as evidence "in another State, to show that the agent stood in "no representative character to the company, that "his duties were limited to those of a subordinate "employee or to a particular transaction or that his "agency had ceased when the matter in suit arose.

"In the record, a copy of which was offered in "evidence in this case, there was nothing to show, "so far as we can see, that the Winthrop Mining Com- "pany was engaged in business in the State when "service was made on Colwell. The return of the "officer, on which alone reliance was placed to sus- "tain the jurisdiction of the State court, gave no in- "formation on the subject. It did not, therefore, "appear even *prima facie* that Colwell stood in any "such representative character to the company as "would justify the service of a copy of the writ on "him. The certificate of the sheriff, in the absence "of this fact in the record, was insufficient to give "the court jurisdiction to render a personal judg- "ment against the foreign corporation. The record "was therefore properly excluded."

In the later case of

Connecticut Mutual Life Ins. Co. *vs.* Spratley, 172 U. S., 602,

the defendant was a Connecticut corporation which from 1870 to 1894 carried on a life insurance business in the State of Tennessee through agents who transacted the business in Tennessee. In 1875 the Legislature of Tennessee passed a statute requiring foreign insurance companies to file with the Insurance Commissioner a power of attorney, authorizing the Secretary of State to acknowledge service of process for the company at all times

thereafter, even though the insurance company might subsequently have retired from or been excluded from the State. In pursuance of this Act the Connecticut corporation filed such power of attorney and never subsequently revoked it. In 1887 the Legislature of Tennessee passed another statute, which provided that foreign corporations doing business in the State should be subject to suit there to the same extent as domestic corporations so far as related to transactions within the State or causes of action arising therein; and further, that any corporation that had any transactions with persons or concerning any property situated in the State through any agency whatever acting for it within the State, should be held to be doing business therein. In 1889 the Connecticut corporation insured, through an agent who came into the State, the life of one Spratley. In 1894 the Connecticut corporation ceased to issue new policies in Tennessee; withdrew its agents from the State and notified the Insurance Commissioner to that effect. It continued, however, to receive premiums on the policies then in existence in Tennessee, through a former agent for that State, who resided in Kentucky, and settled claims on the policies as they fell due. In 1896 Spratley died, and the Connecticut corporation sent into Tennessee an agent to investigate and adjust the claim. This agent had been in the service of the company for special service in any matters which might be referred to him. He was, while in Tennessee, authorized to compromise the claim on the Spratley policy upon certain terms. The compromise not having been made, suit was brought upon the policy in Tennessee and the writ served on this agent, who had been conducting the negotiations. The company then filed a bill in a State court to enjoin the proceedings. The Supreme Court of the State refused relief, and this court sustained the decree, on the ground, first, that the withdrawal of its agents and refusal to issue new policies within the State was not a discontinuance of its business as to the existing policies procured in the State, and as to which it continued to collect the premiums through

its former agent; and, second, that the agent on whom the service was made could fairly be considered a representative agent for the transaction of its business within the State, and therefore amenable to service.

In the course of the opinion (delivered by Mr. Justice Peckham) the rule governing such cases is again concisely and clearly stated, as follows:—

> "In a suit where no property of a corporation is "within the State and the judgment sought is a per- "sonal one, it is a material inquiry to ascertain "whether the foreign corporation is engaged in doing "business within the State (Goldey *vs.* Morning News, "156 U. S., 519; Merchants' Mfg. Co. *vs.* Grand "Trunk Ry. Co., 13 Fed. Rep., 358), and if so the "service of process must be upon some agent so far "representing the corporation in the State that he "may properly be held in law an agent to receive "such process in behalf of the corporation."

It will be observed that in one of these cases the jurisdiction was denied; in the other it was affirmed; but in both cases the statement of the principles determining the result was the same. In both cases it was affirmed that in order to sustain the jurisdiction the corporation must be doing business within the State, and the service must be made upon an agent or officer who could fairly be said to be the representative of the corporation in the business there conducted.

The present case, therefore, must necessarily turn upon the inquiries:—

First.—Whether the Pennsylvania Lumbermen's Mutual Fire Insurance Company was doing business in New York.

Second.—Whether service on a director who did no business for the corporation in New York, but who happened to reside there, was a service on the corporation.

It is submitted that both these questions must be answered in the negative.

AS TO THE QUESTION WHETHER THE CORPORATION WAS DOING BUSINESS IN NEW YORK.

The findings by the court below expressly negative most of the facts which are usually relied on in such cases to prove that the foreign corporation is doing business within the State.

It is expressly found that the company has no agents or officers within the State of New York, and has not had at any time; that the company has no office in the State, has not been licensed to do business therein, and has taken no steps to obtain such license; that all its applications for insurance, including the one for the policy in suit, were made to it by mail addressed to its home office in Pennsylvania, and that the policies were executed and issued there and then mailed to the insured. It is found that while three of its directors reside in New York, they perform no duties and do no acts for the company in New York, and never have, and that their sole duty is to attend meetings in Pennsylvania and there give advice. There is no finding that the company ever sent into the State any officer or agent authorized to solicit or receive applications for insurance or to receive or make payments or to carry on in any way any branch of the company's business.

Standing alone these findings would conclusively establish that the company was not doing business in New York. It remains only to consider how far this conclusion is affected by certain other facts found by the court below.

These facts will be found to be substantially four in number, viz.:—

1. Three of the company's directors reside in the State of New York, although they perform no duties and do no acts for the company in that State.

2. Something less than one-third of the contracts of insurance made in Pennsylvania by the company relate to property situated in the State of New York.

3. When there occurs a loss by fire in New York which is covered by one of the company's policies, it sends adjusters to New York for the purpose of adjusting the amount of the loss.

4. It sends by mail circulars into New York soliciting business, and it sends its manager to conventions of lumbermen held in New York for the purpose of pointing out the advantages of insuring with it, but not, so far as appears, for the purpose of soliciting or receiving applications.

These facts will be considered *seriatim*.

AS TO THE RESIDENCE OF THE DIRECTORS.

That the residence in a State of directors of a foreign corporation does not give the corporation a domicile in the State or constitute the carrying on of business there has been conclusively settled by the decision of this court in

Conley *vs.* Mathieson Alkali Works, 190 U. S., 406.

In that case two of the directors of a Virginia corporation resided in New York, and service was made upon them in a suit against the corporation. This court affirmed an order setting aside the service. In the opinion (delivered by Mr. Justice McKenna) it is said:—

> "The residence of an officer of a corporation does "not necessarily give the corporation a domicile in "the State. He must be there officially—there rep- "resenting the corporation in its business."

As to the Issuing of Policies Against Loss by Fire of Properties Situated in New York.

The business of the defendant corporation was strictly that of fire insurance. It made contracts in Pennsylvania by which it undertook to pay in Pennsylvania a sum of money, not exceeding a specified limit, upon proofs delivered in Pennsylvania by the insured showing that he had sustained pecuniary loss by the destruction of or injury to his property by fire.

This business did not involve any possession of or work upon the property itself, nor the taking of title to the property, either absolutely or in pledge. It was purely a business of making contracts to pay money upon the presentation of proofs of pecuniary loss.

All these contracts were made in Pennsylvania. No applications were solicited or received in New York, no premiums were paid there, no losses paid there. In fact, the company had no office or agents in New York, either temporary or permanent, who were authorized either to solicit or receive applications or deliver policies or make payments.

Under these circumstances it is submitted that the Pennsylvania corporation could not be said to be carrying on business in New York merely because its contracts made in Pennsylvania and to be performed in Pennsylvania related to an indemnity against loss by fire to property in New York.

To hold that because business carried on in the home State of a corporation relates to persons or property in another State, therefore the corporation is engaged in doing business in that other State, although the contracts do not involve possession of or title to or acts done upon the property, would be to announce a novel doctrine, the results of which would be wide reaching and embarrassing.

A few examples may serve to illustrate this. If an accident insurance company issued accident policies in its own State, and in any year one-third of the losses arose

from accidents occurring in another State, would the insurance company be held to be doing business in that other State?

If a credit insurance company issuing policies in its own State happened to have one-third of its losses due to failures in another State, would the company be held to be doing business in that other State?

If the majority of the guests of a hotel keeper in New York were citizens of New Jersey, would the hotel keeper be held to be doing business in New Jersey?

If a publishing house in New York published a biographical dictionary of the leading citizens of Connecticut, or a work descriptive of the most beautiful buildings in Connecticut, would it be held to be doing business in Connecticut?

If a New York banker had for his principal business in any year the underwriting and sale of railway bonds secured by mortgages of railroads in Pennsylvania, would the banker be said to be doing business in Pennsylvania?

Such examples might be multiplied indefinitely.

It is not contended that the making and performance of such contracts might not be accompanied by the doing of business in the foreign State. The business might be of such a character as to necessarily involve possession of or title to or work upon property in the foreign State, or the corporation might for its own convenience voluntarily send its agents into the foreign State to solicit or execute or perform its contracts. What is now contended is that the mere fact that the contracts made in the home State relate to property or persons in the foreign State does not make the execution and performance of such contracts the doing of business in such foreign State.

In the case of

Allgeyer *vs.* Louisiana, 165 U. S. Reports, 578, a statute of Louisiana had prohibited any person from doing any act to effect insurance on property in the State in any marine insurance company which had not com-

plied with the laws of the State. The defendant made a contract with the Atlantic Mutual Insurance Company, a corporation of New York, for an open policy of marine insurance of $200,000, and subsequently mailed from New Orleans to the company in New York a communication stating that insurance was wanted on a certain risk under the open policy. The judgment having been given against the defendant, an appeal was taken to this court, which reversed the judgment. In the course of the opinion, delivered by Mr. Justice Peckham, it was said:—

> "The Atlantic Mutual Insurance Company of New "York has done no business of insurance within the "State of Louisiana and has not subjected itself to "any provisions of the statute in question. It "had the right to enter into a contract in New York "with citizens of Louisiana for the purpose of in- "suring the property of its citizens, even if that "property were in the State of Louisiana, and "correlatively the citizens of Louisiana had the "right without the State of entering into contract "with an insurance company for the same purpose. "Any act of the State Legislature which should pre- "vent the entering into such a contract, or the "mailing within the State of Louisiana of such a "notification as is mentioned in this case, is an im- "proper and illegal interference with the conduct "of the citizen, although residing in Louisiana, in "his right to contract and to carry out the terms "of a contract validly entered into outside and be- "yond the jurisdiction of the State."

The court also, in the course of the opinion, said:—

> "The mere fact that a citizen may be within the "limits of a particular State does not prevent his "making a contract outside its limits while he him- "self remains within it."

In the case of

United States *vs.* American Bell Telephone Co., 29 Fed. Rep., 17.

referred to in the opinion in

Connecticut Mut. Life Ins. Co. *vs.* Spratley, 172 U. S., 602.

already cited, the American Bell Telephone Company, a corporation of the State of Massachusetts, furnished the telephone instruments and the right to operate them to companies in other States. In one of those other States suit was brought against it and service attempted. Jackson, J., delivering the opinion, said:—

> "Without undertaking to review the authorities "on the subject of a corporation's liability to suit "in a State or district other than that of its creation, "we think the decisions of the Supreme Court have "settled and established the proposition that, in "the absence of a voluntary appearance, three con- "ditions must concur or co-exist in order to give the "Federal courts jurisdiction *in personam* over a "corporation created without the territorial limits "of the State in which the court is held, viz.: (1) "it must appear as a matter of fact that the corpo- "ration is carrying on its business in such foreign "State or district; (2) that such business is trans- "acted or managed by some agent or officer appointed "by and representing the corporation in such State; "and (3) the existence of some local law making "such corporation, or foreign corporations generally, "amenable to suit there as a condition, express or "implied, of doing business in the State. * * *
>
> "It cannot be held sufficient to give this court "jurisdiction *in personam* over a foreign corpora- "tion that it has property rights, however exten- "sive, within the district, or that it has pecuniary "interests, however valuable, in business managed "and conducted by others. It must itself be carry- "ing on business in its own right, on its own re- "sponsibility, and for its own account, and through "or by means of its own agents, officers or repre- "sentatives, in order to bring it within the operation "of the laws of a State other than that in which it "is incorporated, making it amenable to suit there "as a condition of its doing business in such State."

In the case of

Marine Ins. Co. *vs.* St. Louis, &c., S. Ry. Co., 41 Fed. Rep., 643,

an insurance company, which, by reason of having paid a

loss by fire, had been subrogated to the rights of the insured, brought an action against the railway company for the destruction of the goods. There was a defense that the plaintiff was an insurance company which had not complied with the laws of the State regarding insurance companies doing business within its borders. The court said:—

> "Another defense relied on is that the plaintiff "is a foreign corporation that had not complied "with the laws of this State at the time of the issue "of its policies. This defense is based on the Act "approved April 4th, 1887 (Acts Ark., 1887, page "234), which provides 'that, before any foreign "'corporation shall carry on any business in this "'State,' it shall file a certificate in the office of the "Secretary of State, designating an agent, a citizen "of this State, upon whom service of process may "be made, and that in default thereof the contracts "of such foreign corporations with citizens of this "State shall be void. There is no force, however, "in this defense, since the evidence shows that the "contracts of insurance were made in the State of "New York, and that the policies were issued in "that State. As was said by Gresham, J., in Lamb "*vs.* Bowser, 7 Biss., 315, it is hardly competent "for the legislature of this State 'to declare that "'the citizens of this State shall not be allowed to "'make such contracts as they please, out of the "'State, for the insurance of their property, whether "'it be within or without the State.' Certainly it "was not the intention of the legislature to go so "far; and the court so held in that case, where the "statute was the same, in substance, as our own. "Certainly the issuing of a policy in New York, on "property here, cannot be considered as the carrying on of business in this State, within the intent "and meaning of the statute in question."

In the case of

Sullivan *vs.* Sheehan, 89 Fed. Rep., 247,

the question arose whether loans made by an Illinois as-

sociation to residents of Minnesota, constituted the doing of business in the latter State. The court said:—

> "I apprehend that the penalties which are denounced by statute against these companies in case they do business with residents of this State, apply only to cases where such business is done within the State. Such a statute cannot possibly have an extraterritorial effect, so as to prevent a company of that kind, located in Chicago, from transacting business lawfully with a resident of Minnesota who should go to Chicago and transact the business there. There is nothing in that statute that would prevent such a resident of Minnesota from going to Chicago, and there applying and subscribing for and acquiring stock of an association of this kind, and there obtaining, if he could, a loan from a corporation of this kind. I think there is nothing in this statute preventing him from there giving security upon property situated in Minnesota, to secure such a loan. The prohibition is aimed at such companies as, by their officers or agents, come into the State of Minnesota—within the territorial limits of the State—to solicit and transact business; and cannot affect business which they perform outside of the State, where they have a right to transact business merely because such business is transacted with a resident of the State of Minnesota."

The decisions of the State courts, including the State of New York, are in harmony with this construction of the law.

In the case of

Hyde *vs.* Goodnow, 3 Comstock (N. Y.), 266,

a mutual fire insurance company had an agent residing in the State of Ohio, authorized to receive applications for insurance. The agent received from a resident of Ohio an application and premium note, and transmitted them to the office of a New York insurance company, in the State of New York. They were received, passed upon and approved, and a policy was transmitted to the appli-

cant by mail. The agent had no authority to make insurances. Suit was brought in New York upon a premium note, and defense was set up that by the laws of Ohio the contract was void, being an insurance effected in that State by a foreign company, contrary to its statutes. The court said:—

> "The applications of the defendant for insurance "could in no sense have been regarded as a contract "until they had been accepted by the company. "The agent did not assume to do anything which "would bind the company. His office was to re- "ceive, and submit to the company, the defendant's "propositions. Until the company acted upon "such propositions, it was within the defendant's "power at any time to recall them. Before the "company had agreed to insure, the defendant, "notwithstanding the execution and delivery of "the notes and applications to the agent of the "company, might have withdrawn his applications, "and upon his doing so, his notes would have been "inoperative. Until then, the transactions were "wanting in that mutuality which is essential to a "valid contract. But when the company having "received the applications, accompanied with the "notes, consented to insure, and issued its policies, "what was before revocable became irrevocable. "What was before a mere proposition, then became "invested with the attributes of a contract, and "from that time each party became bound for its "performance. If this be so, the contracts are to "be regarded as having been made when the com- "pany received and accepted the defendant's ap- "plication and issued and transmitted to him their "policies. Of course, they were contracts made in "the State of New York, and not in Ohio. The in- "surance was not effected in Ohio, nor were the "policies 'signed, issued or delivered' there. The "case, therefore, is not within the prohibitions of "the statute."

In the case of

Huntley *vs.* Merrill, 32 Barbour, 626,

a New York insurance company had insured property in

Pennsylvania belonging to a Pennsylvania citizen. The negotiations for the insurance were made in Pennsylvania by an agent of the New York insurance company, who was authorized by the company to make surveys and receive applications, but he had no power to ratify or approve the applications, or to issue policies, or to make contracts of insurance. The applications were approved by the company in New York, the policy issued in New York and mailed to the insured in Pennsylvania. Suit was brought in New York upon a premium note, and the defense was that by certain statutes of Pennsylvania it was provided that no corporation of any foreign State should be insurers within the State against loss by fire upon any property within the State, but that a mutual fire insurance company chartered in an adjoining State might have an agency or agencies and become insurers. The court, while deciding the case on another ground, said:—

> "I am inclined to think that Hyde *vs.* Goodnow "(3 Comst., 266), disposes of the second question. "In this case, as in that, the contract was made at "the office of the company in this State. In that "case the statute declared 'No policy of insurance "'of any description, or for any purpose, shall be "'signed, issued or delivered in this State, nor on "'any property of any kind situated in this State, "'by any association, company or corporation not "'chartered by the laws of this State, except,' &c., "and the statute made null and void all policies, "&c., made contrary to its provisions. The case "was not within the exception contained in the "statute. The plaintiff was permitted to recover, "as the contract was made in this State."

In the recent case of—

Cummer Lumber Co. *vs.* Associated M. F. Ins. Co., 67 App. Div., 151,

affirmed without opinion by the Court of Errors and Appeals of New York in—

Cummer Lumber Co. *vs.* Associated M. F. Ins. Co., 173 N. Y, 633.

a manufacturing corporation of Florida employed an agent within the State of New York to solicit orders and to make estimates. This agent had an office, and was paid by a commission. The orders were sent from New York to the plaintiff in Florida, where they were accepted, and the bills and goods sent directly from Florida to the customers. A suit was brought in New York by the Florida corporation, and the defendant set up that it was doing business in New York, without a certificate, contrary to the New York statute, which provided that no foreign stock corporation doing business in the State should maintain any action on any contract made in the State until it had such a certificate. It was held that the corporation was not doing business within the State. The court said:—

> "The plaintiff's agent was no more than a traveling salesman, with permanent headquarters in the city of New York, and the evidence clearly shows that he maintained, not an office of the plaintiff, but an office for his own use and he did business in this State for the plaintiff only in the sense that every traveling salesman for an individual or a corporation having a domicile or place of business outside of this State, does business for his employer by soliciting orders to be approved and accepted at the home office."

In the case of—

Seamans *vs.* The Knapp-Stout Co., 89 Wis., 171, an insurance company of Wisconsin issued and mailed policies on properties in the States of Iowa and Missouri, but had not complied with the insurance laws of those States. It was claimed that by the laws of those States the policies were void. The court said:—

> "But each of the contracts for the insurance of such property against loss by fire was a mere contract for indemnity in case of loss. Darrell *vs.* Tibbitts, 5 Q. B. Div., 560; Stanhilber *vs.* Mut. M. Ins. Co., 76 Wis., 291. Although it related to the loss of such property, yet it in no way attached to or affected the title to such property. *Ibid.* Such being

"the nature of the contracts sued upon and the "residence of the two corporations, there would "seem to be no good reason why they could not, "within the State of Wisconsin, make valid con- "tracts for indemnity against loss by fire of such "properties, notwithstanding the same were located "in such other States."

In the case of—

Clay F. & M. Ins. Co. *vs.* Huron, &c., Co., 31 Mich., 346,

where the defense was that a foreign insurance company had issued policies in Michigan without complying with the laws of that State, the court said:—

"In regard to the first of these, it is sufficient to "say, without looking further, or seeking other "grounds, that the contract of insurance here pur- "ported to have been made in another State, and "that the defense explicitly assumed such to be the "fact. The contract was personal and not real, "and although it had relation in a certain sense to "realty, it was not operative upon the estate, but "merely as an agreement to pay money in case the "erections, or other property specified, should be "damaged by fire. The circumstance that the "liability to pay was made to depend upon an "event to real property here, did not make the con- "tract a Michigan contract, or in any legal sense "make this State the place of performance by the "insurance company. And the further circum- "stance that the contractee was a Michigan cor- "poration, did not impress upon the contract the "quality of locality, so as to cause our laws in "regard to business done here by agents of foreign "companies to affect it in point of law."

In the cases of—

City of New Orleans *vs.* Rhenish, &c., Lloyds, 31 La. Ann., 781;

State *vs.* Williams, 46 La. Ann., 922,

the question arose as to the operation of the State insurance laws on foreign companies issuing policies directly from

their respective domiciles, and the court held that such companies were not obliged to take a license. In the last-named case the court said:—

> "We have decided that a foreign insurance com-
> "pany which issues policies directly from its domicile,
> "who has no agent here and who only agrees to
> "accept risks placed for them by a person residing
> "here, cannot be compelled to pay a license."

In the cases in which this court has sustained findings that a foreign corporation was doing business in a State, the decision has always rested on the fact that the business was being actually conducted in the State by agents of the corporation, and not on the fact that the contracts related to property within the State.

Thus, in the case of—

> Connecticut Mut. Life Ins. Co. *vs.* Spratley, 172 U. S., 602,

already cited, the Connecticut corporation had entered into a contract of life insurance with a citizen of Tennessee, through the solicitation of an agent sent by it into Tennessee for that purpose. At that time the corporation was admittedly carrying on business in the State, and had complied with the State statutes prescribing the requisites for a license to so carry on business. Subsequently the corporation withdrew it agents from Tennessee, but continued to collect the premiums on the policy through the former agent, who resided in Kentucky, and on the death of the insured, it sent its agent into Tennessee to negotiate and compromise with the beneficiary. Suit was brought in Tennesee and the writ served on this agent. The jurisdiction was sustained on the ground that the contract had been solicited and procured by an agent in Tennessee; that the mere withdrawal of its agents by the company, while continuing to collect the premiums on such policies, was not a discontinuance of this business, and that the agent sent to compromise the claim was a representative agent engaged in such business in the State.

The case of—

Chattanooga Nat. B. & L. Assn. *vs.* Denson, 189 U. S., 408,

was ruled on substantially the same grounds. In that case the Tennessee corporation, through an agent in Alabama, had made loans in that State secured by mortgages on Alabama property. The contract was procured and the papers delivered through an agent in Alabama, although the note evidencing the loan purported to be dated and payable in Tennessee. The corporation had paid the license fee required by Alabama from foreign corporations and supposed that it was carrying on business in that State in compliance with the State law, although in point of fact it had not complied with all of the requirements of that law. It was held that the business was really transacted through the agent in Alabama, and was intentionally so done, the corporation supposing that it was rightfully carrying on business within the State.

In both these cases the business was actually carried on in the State by agents sent there for that purpose, and this business related to the solicitation or delivery or performance in the State of the contract. In the present case neither the contract in suit nor any other contract was solicited, executed, delivered, or performed, either partially or wholly, by any agent within the State. It never applied for a license to do business in New York and never sent any agent into New York who was authorized to do business for it there. It is submitted that the mere fact that it issued policies of insurance in Pennsylvania against losses on New York property did not constitute the doing of business in New York.

As to the Sending of Adjusters into New York to Adjust the Amount of Loss.

There is nothing in the record to show that these adjusters had any authority to deal on behalf of the company with persons in the State of New York. There is nothing to show that they were other than mere appraisers sent to estimate the value of the goods and the amount of the loss

and report to the company. Even if they had been authorized to settle and compromise the claim with the insured, this would not have amounted to a doing of business in New York by the corporation, but would have been a mere settlement of liability under business contracts made and to be performed elsewhere.

It might be that if it appeared from other facts that the corporation was actually doing business in the State, service might be made upon an agent sent into the State with general powers to settle and compromise a liability arising in the course of that business. If, however, the corporation is not otherwise doing business in the State, the sending of an agent to appraise or inspect or examine the facts with regard to a claim against it, or even to compromise or settle such a claim, could not constitute the doing of business if the business in the course of which the claim arose was actually carried on outside of the State. Otherwise a corporation purchasing by mail orders lumber in a foreign State might be held to be carrying on business in a foreign State because it was in the habit of sending its inspectors to agree with inspectors of the vendors as to the count and quality of the lumber as it was loaded or because it was in the habit of settling disputes by arbitrators, mutually chosen, who met in the foreign State. Or it might be held that a corporation was doing business in a foreign State because it was in the habit of sending its attorney into that foreign State to settle claims of citizens of that State arising in the course of business carried on exclusively in its home State.

It is not necessary, however, to discuss this question further, since, as has been already pointed out, there is no finding that the adjusters sent into New York by the Pennsylvania corporation to adjust the amounts of losses under its policies had any powers to represent the company in dealings with others or to do anything but measure or adjust and report to the company the amounts of such losses.

In the case of—

Sullivan *vs.* Sheehan, 89 Fed. Rep., 247,

already cited, it was contended that the Chicago company which made loans to Minnesota residents, was doing busi-

ness in Minnesota, because its officers came to Minnesota to inspect the property. The court said:—

"The evidence shows that at some time Marston "and some other officers of the Chicago company "came here, and that they did look over this prop- "erty; but it does not appear that while here they "solicited or obtained any application for member- "ship, or made, negotiated or promised any loan. "I do not think their merely coming here and look- "ing over the property for the purpose of satisfying "themselves as to its value, in case it had been or "should be offered as security for the business "transacted in Chicago, comes within the inhibi- "tion of the statute, or renders, or tends to ren- "der, the contracts that were afterwards made, "Minnesota contracts."

In the case of—

People *vs.* Gilbert, 44 Hun. (N. Y.), 522,

the court said:—

"The defendant demurred, on the ground that the "complaint did not state facts sufficient to consti- "tute a cause of action, and his demurrer was sus- "tained at Special Term. This decision was right, "unless the adjustment of a loss is 'transacting the "'business of fire or inland navigation insurance,' "within the meaning of the statute. We do not "think these words were used with the intent to "prevent the fire insurance companies of other "States or foreign countries from employing agents "to take the necessary steps to pay their debts here. "The complaint speaks of the subject of the adjust- "ment as 'a certain loss or indebtedness.' A liability "has accrued against the Pennsylvania corporation "arising out of insurance on New York property. "There is nothing to show that the contract of in- "surance was not made under such circumstances as "to be perfectly legal. The policy may have been "issued in Pennsylvania to citizens of that State "on property situated in New York. If lawfully "issued there, the insurers would be liable here.

"(Hope Mutual Life Ins. Co. *vs.* Perkins, 38 N. Y., "404, 408.) Being under obligation, therefore, to "pay something, the company employed an agent "to ascertain how much it ought to pay, by investi- "gating the extent of the loss in the locality where "it occurred. It does not seem to us that the statu- "tory prohibition was aimed at such acts as this. "The purpose of the statute is an important con- "sideration in passing upon the question presented "here. It was designed to afford our own citizens "security in dealing with the fire insurance com- "panies of other States and foreign countries, which "were allowed to be represented in this State by "agents who effected insurance in their behalf. "Foreign insurance corporations were not to be "permitted to come here into our own territory "and solicit business and take risks unless they "would submit to certain conditions imposed for "the benefit of those who might deal with them. "If they make legal contracts elsewhere, however, "relating to property in this State, it is not an ad- "vantage, but an injury to the New York prop- "erty owner to prohibit them from fulfilling such "contracts here. Indeed there might be some "question how far the power of the legislature ex- "tends in this direction. So that if we consider "the evident object sought to be attained by the "statute, it would seem that the adjustment of a "loss and indebtedness is not within the purview "of the prohibition, which was intended, not as a "protection to New York insurance companies "against outside competition, but as a safeguard "to those seeking insurance in outside companies "represented within the State."

In the case of—

French *vs.* The People, 6 Col. App., 311,

a statute prohibited any one from delivering policies or adjusting losses or aiding in the transaction of insurance business with unlicensed companies. The defendant was an adjuster sent to appraise the loss, but without authority to agree with the insured. The court said:—

"I can see no good legal reason why an insurance "company owing a debt to a citizen should be any "more restricted in its right to send an agent to "ascertain the amount, preparatory to payment "than any other debtor. Any construction of the "statute that would have that effect would violate "public policy and fundamental law and be void."

AS TO THE SOLICITATION OF BUSINESS BY MAIL CIRCULARS AND THE ADVERTISING OF THE MERITS OF THE COMPANY BY ITS MANAGER WHILE ATTENDING CONVENTIONS.

It appears by the finding of facts that the Pennsylvania corporation sent mail circulars into the State of New York, but it is not found or intimated that these mail circulars suggested that the business thus solicited could be done with the company in the State of New York or through any agent there. In like manner it is found that the manager of the company while attending conventions in New York State "urged upon those attending upon "such conventions the advantage of insuring with it;" but it is not found or intimated that the manager offered to receive or did receive applications, or that he suggested that the insurance could be effected elsewhere than at the office of the company in Pennsylvania, or that communications could be received or forwarded through any agency in New York.

It is submitted, therefore, that the findings on this point, so far from showing that the Pennsylvania company was doing business in New York, show conclusively that it was not doing business there, but was endeavoring to persuade citizens of New York and other States to come to Pennsylvania, either in person or by mail, and transact business with the company there.

It would be a novel doctrine that because a corporation advertises by means of mail circulars sent to citizens of New York or by means of advertisements in New York papers, it is thereby doing business in the State of New York. Of course, if the advertisement requests or sug-

gests that the business may be transacted through an agent of the company in New York, it might be some evidence that the company is doing business there, but if it suggests no other way of doing business with the corporation than sending in person or by mail to its office in its own State, it is not only no evidence of the transaction of business in New York, but very persuasive evidence that there is no agency in New York, and that the company does not transact any of its business there. It would seem to be equally true that the mere fact that the manager attends conventions in New York for the purpose of advertising the merits of his company and urging others to do business with it is no evidence that the company is doing business in New York State unless it be suggested that the business can be done in whole or in part in New York or through or with the assistance of an agent there.

In the case of

Carpenter *vs.* Westinghouse Air-Brake Co., 32 Fed. Rep., 434,

the defendant corporation had, within the State, a train of cars, its personal property, to which was attached the brake which it manufactures and sells, which train of cars and brake were exhibited and used simply for the purpose of exhibition. They were not run for the purpose of carrying freight or passengers, but simply for advertisement. The opinion of the court was delivered by Mr. Justice Brewer, then Judge of the Circuit Court, and in the course of it he said:—

> "It is not pretended that the train of cars was "run for any purpose of carrying freight or passen- "gers. The defendant did not engage in the busi- "ness of transportation. It was showing its prop- "erty. It appears affirmatively that it did not make "any contracts for the sale of this brake, so that all "that can be said is that it was having its prop- "erty in this State on exhibition, and for that pur- "pose only. Does the fact that the chief officers of

"the corporation come into the State with some of "its property for advertisement and exhibition bring "that corporation into the State as an inhabitant, "or so that it can be said to be found within the "State within the Act of Congress? * * *

"Suppose there was a corporation in Illinois en- "gaged in the breeding and selling of Norman horses, "and it should send one of the principal officers to "this State to attend the various county fairs with "some of its fine animals. In one sense it is carry- "ing on a business; that is, it is engaged in adver- "tising; but can it be said it is engaged in the busi- "ness for which it is incorporated? Can it be said "to have established an office or agency in this State "for the carrying on of that business? If we say "that the mere matter of advertising a business is the "introduction of that business in the State, it would "follow that every corporation located elsewhere that "should send its circulars into the State, send news- "papers with its advertisement, would be engaged "in its business in that State, and to be found there "for purposes of suit."

Nothing can be added to this illustration. It is conclusive on the subject.

While each fact found by the court has been discussed separately, they are no stronger in support of the jurisdiction if considered together. Practically they amount to a finding that the Pennsylvania corporation carried on its business wholly in Pennsylvania, and not through any agency in New York; that it desired and sought to obtain as customers citizens of New York, and did have a large number of such customers, but that it declined to deal with them in New York and invited them always to come either in person or by mail to Pennsylvania, where alone it carried on its business with them, received all applications and payments, delivered all contracts and made all payments.

Under these circumstances it is submitted that the company cannot be held to have been carrying on business in New York.

If the Pennsylvania Lumbermen's Mutual Fire Insurance Company was not carrying on business in the State of New York, that fact is conclusive against the jurisdiction, since the case in then on all fours with the case of

Conley *vs.* Mathieson Alkali Works, 190 U. S., 406, in which service upon a resident director of such a corporation was held not to give jurisdiction.

If, however, the court should hold that the company was carrying on business in New York, then the further question arises, Was the corporation properly brought into court by service upon its representative officer or agent?

The record does not set out the New York statutes with regard to service on foreign corporations, but as this court will take judicial notice of such statutes, attention is called to them. They provide as follows:—

CODE OF CIVIL PROCEDURE.

"SECTION 1780. When Foreign Corporations may "be Sued.

"An action against a foreign corporation may be "maintained by a resident of the State, or by a "domestic corporation, for any cause of action. An "action against a foreign corporation may be main- "tained by another foreign corporation, or by a "non-resident, in one of the following cases only:—

"(1.) Where the action is brought to recover "damages for the breach of a contract made within "the State, or relating to property situated within "the State at the time of the making thereof.

"(2.) Where it is brought to recover real property "situated within the State, or a chattel, which is "replevied within the State.

"(3.) Where the cause of action arose within the "State, except where the object of the action is to "affect the title to real property situated without "the State.

"SECTION 432 (amended 1877, chapter 416). How "Personal Service of Summons Made upon a Foreign "Corporation.

"Personal service of a summons upon a defend- "ant, being a foreign corporation, must be made "by delivering a copy thereof within the State, as "follows:—

"(1.) To the president, treasurer or secretary; or, if "the corporation lacks either of those officers, to "the officer performing corresponding functions "under another name.

"(2.) To a person designated for the purpose by a "writing, under the seal of the corporation, and "the signature of its president, vice-president or "other acting head, accompanied with the written "consent of the person designated, and filed in the "office of the Secretary of State. The designation "must specify a place, within the State, as the office "or residence of the person designated; and, if it "is within a city, the street, and street number, "if any, or other suitable designation of the par- "ticular locality. It remains in force until the fil- "ing in the same office of a written revocation thereof, "or of the consent, executed in like manner; but the "person designated may, from time to time, change "the place specified as his office or residence, to "some other place within the State, by a writing, "executed by him, and filed in like manner. The "Secretary of State may require the execution of "any instrument, specified in this section, to be "authenticated as he deems proper, and he may "refuse to file it without such an authentication. "An exemplified copy of a designation so filed, ac- "companied with a certificate that it has not been "revoked, is presumptive evidence of the execution "thereof, and conclusive evidence of the authority "of the officer executing it.

"(3.) If such a designation is not in force, or if "neither the person designated nor an officer speci- "fied in subdivision first of this section, can be "found with due diligence, and the corporation has "property within the State, or the cause of action "arose therein; to the cashier, a director or a manag- "ing agent of the corporation, within the State."

It will be observed that under these provisions service is only authorized on a director of a foreign corporation where neither the designated agent of the corporation nor certain other enumerated officers can be found, and either the corporation has property within the State or the cause of action arose therein.

It appears from the record that the company had no designated agent in New York. It does not expressly appear that the other enumerated officers could not be found, but perhaps this is a fair inference from the finding that "the company has no agents or officers within that "State, and has not had at any time." There is no finding that the company has any property within the State. The question, therefore, is narrowed to two matters, viz.:—

1. Did the cause of action arise within the State?

2. Was a service on a resident director who had no duties and performed no acts within the State of New York a valid service?

DID THE CAUSE OF ACTION ARISE WITHIN THE STATE?

If the action had been in tort, for negligently setting fire to plaintiff's premises, the cause of action would have been the fire, or rather the act of the defendant in New York in causing it. The action, however, was in contract, upon the written policy of insurance. The terms of the policy are not found by the court, but the general nature of policies of fire insurance is well known. It has been held, that unlike policies of life insurance, which are contracts to pay a definite sum upon a certain event, they are contracts of indemnity. The obligation is not ordinarily to pay a definite sum in case there is a fire, but to indemnify within certain limits a loss which the insured shall prove to have been incurred from fire. The cause of action was therefore the alleged breach by the insurance company of its contract, or in other words, its refusal to pay at the

place and time, and upon the conditions stipulated by its policy or written contract. It appears by the finding of the court that all the defendant's policies were executed in Pennsylvania and delivered there by deposit in the mail, and presumptively, the proofs of loss were to be furnished in Pennsylvania and the payments made there, since it affirmatively appears that the company maintained no office or agents within the State of New York. At all events the burden was on the plaintiff to justify the source by showing the jurisdictional facts. How, then, can it, with any justice or accuracy, be said that the cause of action, in the present case, arose in the State of New York? The cause, as has been said, was not the fire. It was the failure of the company to make payments in Pennsylvania when the proofs of loss were delivered to it there. A very simple test of this will be found by reference to the case of a statute of limitations. Such a statute usually runs from the time when the cause of action accrues, and the cause of action has always been held to accrue at the time when the plaintiff has an immediate right to bring his action. Such a statute cannot run from the date of the fire, because the mere occurrence of the fire did not make the policy payable. It would run from the time when, under the terms of the policy, the company failed to pay the amount due, at the place where, under the contract it was payable. This breach, however, occurred not in New York, but in Pennsylvania.

It is submitted, therefore, that the cause of action did not arise in New York and that the service was not justified even by the New York statute.

WAS THE SERVICE OF A RESIDENT DIRECTOR WHO HAD NO DUTIES AND PERFORMED NO ACTS IN THE STATE FOR THE CORPORATION, A SUFFICIENT SERVICE?

If the court, in accordance with the argument already made, should be of opinion that the cause of action did not arise in the State of New York, then the service was clearly bad, under the New York statute. If, however,

the court should be of opinion that the cause of action did arise within the State of New York, then a question arises whether the statute is to be so interpreted as to allow service on any person who is a director, or only upon a person who is a director having duties to perform in the State of New York.

It is submitted that the object of the New York statute was to authorize service upon certain representative agents or officers of a foreign company in the State of New York, when the general officers of the company could not be found there. It might and probably would happen that in the case of a foreign corporation doing business in New York, the president, treasurer or secretary would not be found in that State, but that the business would be transacted either by a cashier, a director or a managing agent in that State. A service on either of the last-named officers or agents would be due service, since these officers would be the real representatives in the State of its business, and it is the fair interpretation of the statute to hold that it meant that the service might be made upon a person who, as cashier, director or agent, was carrying on the business of the corporation therein. Certainly, in the case of a cashier, or an agent, the statute would not be held to cover a service upon one who was cashier or agent only for another State, but who happened to be found in or reside in New York.

In the case of—

St. Clair *vs.* Cox, 106 U. S., 350,

the Supreme Court of Michigan had held that an Act authorizing service on any officer or agent of the corporation, only applied to an officer or agent who was representing the corporation in the State, and did not apply to an officer or agent who had no business duties in the State and was simply found there, and this interpretation was adopted and approved by this court. The Michigan Supreme Court, in language quoted by this court, said:—

> "Admitting, therefore, for the purpose of this "suit, that in given cases the foreign corporation

"would be bound by service on its treasurer in "Michigan, this could only be so when the treasurer, "*the then official, the officer then in a manner im-* "*personating the company, should be served.* Joseph "Price was not here as the treasurer of the defend- "ants. He did not then represent them. His act "in coming was not the act of the company, nor was "his remaining the business or act of any besides "himself. He had no principal and he was not an "agent. He had no official *status* or representative "character in this State."

If this interpretation be adopted for the New York statute, then there was no service in the present case upon a director of the corporation, since it is found as a fact by the court below that the director had no duties whatever in the State of New York, and transacted no business for the company there.

It may be said that the Court of Errors and Appeals of New York in the case of

Pope *vs.* Terre Haute Car Co., 87 N. Y., 137,

decided that service upon the president of a foreign corporation who was temporarily within the State was a good service, and that this amounts to an interpretation of the statute that the officer served need not at the time be engaged in business of the corporation. The question in the present case, however, is a different one. The statute divides into two classes the persons on whom service can be made. It can be made in the first instance on the president, secretary or treasurer. If these parties cannot be found in the jurisdiction and the cause of action arose therein, service can be made on "the "cashier, director or a managing agent of the corporation "within the State." There can ordinarily be only one president, one secretary and one treasurer, and therefore no question could arise as to what kind of a president, secretary or treasurer was meant. There could, however, be various cashiers, directors or agents, and the statute therefore might well mean individuals who within the State were exercising the duties of such offices. For example,

a corporation might have a cashier in its local office in each State, but it would scarcely be contended that service in New York upon a cashier in a New Jersey office who was temporarily in New York on personal business would be good. So also a managing agent for New Jersey might reside in New York, yet the statute certainly did not contemplate service on such a managing agent. This very point arose in

Schmidlaff *vs.* La Confiance Ins. Co., 71 Ga., 246,

where the Georgia statute authorized service on an agent, and service was attempted on an agent for the company for the States of South Carolina and Florida, who happened to reside in Georgia. It was held that the service was bad. At first blush it might seem that a director did not belong in the same class as the cashier or agent, but the resemblance is nearer than at first appears. Directors as individuals do not represent the company, and are not, unless specially authorized, the agents of the company. The universal rule on this point is well stated in

Clark & Marshall on Private Corporations, section 690,

as follows:—

> "As was shown in a former section, the directors "or trustees of a corporation are vested with its "management, not as individuals, but as a board, "and as a general rule they can act so as to bind "the corporation only when they act as a board "and at a legal meeting.
>
> "It follows that the directors or trustees of a "corporation are not individually the agents of the "corporation and have no power individually to "bind it by any contract or other transaction."

Individual directors may, however, be authorized by the by-laws to perform certain duties, and it is not unusual for corporations to have resident directors in different States who are authorized to transact in those States certain business for the corporation. Such direct-

ors would naturally be put in the same class as cashiers and managing agents, and presumably the framers of the New York statute meant in so classifying them to include only directors who, like cashiers and agents, were local representatives of the company performing in the State duties for it.

Even if the court should be of opinion that the New York statute was intended to authorize service upon a director who had no duties whatever in the State of New York, and did not represent the company there, the question would yet remain whether such a service would be recognized by the Federal courts as conferring jurisdiction in a suit against the corporation.

This court, speaking by Mr. Justice Gray, in the case of

Goldey *vs.* Morning News, 156 U. S., 518,

after calling attention to the conflict between the New York decisions and the Federal decisions on this subject, said:—

> "It is an elementary principle of jurisprudence "that a court of justice cannot acquire jurisdiction "over the person of one who has no residence within "its territorial jurisdiction except by actual service "of notice within the jurisdiction, upon him or upon "some one authorized to accept service in his be- "half, or by his waiver, by general appearance or "otherwise, of the want of due service. Whatever "effect a constructive service may be allowed in "the courts of the same government, it cannot be "recognized as valid by the courts of any other "government. * * *
>
> "For the same reason service of mesne process "from a court of a State, not made upon the defend- "ant or his authorized agent within the State, al- "though there made in some other manner recog- "nized as valid by its legislative acts and judicial "decisions, can be allowed no validity in the Circuit "Court of the United States after the removal of "the case into that court, pursuant to the Acts of

"Congress, unless the defendant can be held by "virtue of a general appearance or otherwise to "have waived the defect in the service and to have "submitted himself to the jurisdiction of this court."

This language was repeated and the principle reaffirmed in the case of

Conley *vs.* Mathieson Alkali Works, 190 U. S., 406,

in an opinion delivered by Mr. Justice McKenna.

In the application of this principle two rules have been authoritatively settled by this court, viz.:—

First.—Where a corporation is not domiciled or doing business in a State it cannot there be brought into court by service on an officer or agent who, although within the borders of a State, does not represent it there.

Second.—Where a corporation is domiciled or doing business in a State, it may be brought into court by service on any officer or agent on whom service is authorized by the State laws, provided that such officer has such duties or such a position that he can fairly be said to be the corporation's representative in the State for the purpose of service.

There remains yet a third class of cases, viz., those in which the corporation is doing business in a State and service is made in accordance with the State statutes, but upon an officer or agent who cannot fairly be said to represent the corporation in the State.

This case has not yet been decided by this court, and there are two possible views which may be taken with regard to it.

On the one side it may be said that where a corporation does business in a State, it impliedly agrees that service may be made on it in any way authorized by the State

laws, even though the service so authorized is in no sense notice to the corporation and would not be "due process "of law."

On the other side it may be said that service upon a person not the representative of the company in the State is not due process of law, and is so "contrary to natural "justice and to the principles of international law" that a Federal court is not bound either to take or to recognize jurisdiction of such a suit against the corporation; and further, that even if the court could hold that a corporation could waive in advance its right to due service of the writ in a suit against it, such waiver ought never to be implied.

The question has never been expressly decided by this court, since in all the cases thus far decided by it either the corporation has been found not to be doing business in the State or else it has been found that the service was upon one who could fairly be said to be the representative of the corporation in the State for the purpose of service. The question, however, has been more than once alluded to.

In the case of

St. Clair *vs.* Cox, 106 U. S., 350,

the State statute authorized a service upon "any officer, "member, clerk or agent" of a foreign corporation. This court, speaking by Mr. Justice Field, said:—

> "According to the view thus expressed by the "Supreme Court of Michigan, service upon an agent "of a foreign corporation will not be deemed suffi- "cient unless he represents the corporation in the "State. This representation implies that the cor- "poration does business or has business in the State "for the transaction of which it sends or appoints "an agent there. If the agent occupies no repre- "sentative character with respect to the business "of the corporation in the State, a judgment ren- "dered upon service on him would hardly be con-

"sidered in other tribunals as possessing any pro-
"bative force. In a case where similar service was
"made in New York upon an officer of a corporation
"of New Jersey, accidentally in the former State,
"the Supreme Court of New Jersey said that a
"law of another State which sanctioned such serv-
"ice upon an officer accidentally within its juris-
"'diction was 'so contrary to natural justice and
"'to the principles of international law that the
"'courts of other States ought not to sanction it.'
"Moulin *vs.* Trenton Insurance Co., 24 N. J. L.,
"pages 222, 234.

"Without considering whether authorizing serv-
"ice of a copy of a writ of attachment as a sum-
"mons on some of the persons named in the statute,
"a member, for instance, of the foreign corporation,
"that is, a mere stockholder, is not a departure
"from the principle of natural justice mentioned
"in Lafayette Insurance Co. *vs.* French, which
"forbids condemnation without citation, it is suffi-
"cient to observe that we are of opinion that when
"service is made within the State upon an agent of
"a foreign corporation, it is essential, in order to
"support the jurisdiction of the court to render a
"personal judgment, that it should appear some-
"where in the record, either in the application for
"the writ, or accompanying its service, or in the
"pleadings or the findings of the court, that the
"corporation was engaged in business in the State."

In the case of

Barrow *vs.* Kane, 170 U. S., 100,

this court (Mr. Justice Gray delivering the opinion) said:—

"In Insurance Co. *vs.* French, 18 How., 408, 409,
"the court said 'We limit our decision to the case
"'of a corporation acting in a State foreign to its
"'creation under a law of that State which recog-
"'nized its existence for the purposes of making
"'contracts there and being sued on them *through*
"'*notice to its contracting agents.*'* But it was
"cautiously added, 'The case of natural persons

"'or of other foreign corporations is attended with "'other considerations which might or might not "'distinguish it. Upon this we give no opinion.'"

* The italics are not in the opinion.

In the case of

Conn. Mut. Life Ins. Co. *vs.* Spratley, 172 U. S., 602,

already cited, the statute of Tennessee authorized service on "any agent of said corporation found within the county "where the suit is brought, no matter what character of "agent such person may be." This court (Mr. Justice Peckham delivering the opinion) said in regard to this provision of the statute:—

"The third and fourth sections of that Act "have already been set forth, and they provide "that process may be served upon any agent of "the corporation found within the county where "the suit is brought, no matter what character "of agent such person may be. We are not called "upon to decide upon the entire validity of this "whole Act. The Federal question with which we "are now concerned is whether the court obtained "jurisdiction to render judgment in the case against "the company so that to enforce it would not be "taking the property of the company without due "process of law. Even though we might be un- "prepared to say that a service of process upon 'any "'agent' found within the county, as provided in "the statute, would be sufficient in the case of a "foreign corporation, the question for us to decide "is whether upon the facts of this case the service "of process upon the person named was a sufficient "service to give jurisdiction to the court over this "corporation. If it were, there was due process "of law, whatever we might think of the other pro- "visions of the Act in relation to the service upon "any agent of a corporation, no matter what char- "acter of agent the person might be. If the person "upon whom process was served in this case was a "proper agent of the company, it is immaterial

"whether the statute of the State also permits a "service to be made on some other character of "agent which we might not think sufficiently repre- "sentative to give the court jurisdiction over the "corporation. If the service be sufficient in this in- "stance the corporation could not herein raise the "question whether it would be sufficient in some "other and different case coming under the pro- "vision of the State statute."

Then follows the statement of the general rule already quoted on page 8 of this brief, as follows:—

"In a suit where no property of a corporation is "within the State and the judgment sought is a per- "sonal one, it is a material inquiry to ascertain "whether the foreign corporation is engaged in "doing business within the State (Goldey *vs.* Morn- "ing News, 156 U. S., 518; Merchants' Mfg. Co. *vs.* "Grand Trunk Ry. Co., 13 Fed., 358), and *if so, the* "*service of process must be upon some agent so far* "*representing the corporation in the State that he may* "*properly be held in law an agent to receive such* "*process in behalf of the corporation.*"*

* The italics are not in the opinion.

It will be observed that while in every case in this court in which a foreign corporation has been held to be doing business in a State, the service has been made upon an agent who could fairly be said to represent the company for the purposes of such service, and while, therefore, the exact point now under discussion has not been raised, yet this court, whenever it has had occasion to state the general rule as to jurisdiction, has stated not only that the corporation must be doing business in the State, but also that service must be made upon a person who could fairly be said to represent the corporation in the State for this purpose.

It is submitted that whatever may be the power of a State to grant or withhold a license from a foreign corporation, it can pass no statute which would compel the

Federal courts to take or recognize jurisdiction over that corporation in a suit in which there has been no service upon a representative agent of the corporation—no service which is equivalent to a personal service in the case of an individual. The right to appeal to the Federal courts and the right to be exempt from suit and judgment except by due process of law are rights which cannot be taken away from a corporation simply because it is doing business within a State. It may be that the State can expel the corporation from its borders, but it cannot oust the jurisdiction of the Federal courts or compel those courts to give judgment where there has been no real service.

The limitations upon the power of a State are tersely and accurately set out in the recent opinion of this court, delivered by Mr. Justice Peckham, in

Cable *vs.* U. S. Life Ins. Co., 191 U. S., 288,

as follows:—

> "It has from an early day been held that a corporation created by one State could transact "business in another State only with the consent, "expressed or implied, of the latter State, and that "such consent might be accompanied by such conditions as the latter State might think fit to impose, provided they were not repugnant to the "Constitution or laws of the United States, or inconsistent with those rules of public law which "secure the jurisdiction and authority of each "State free from encroachment by all others, or that "principle of natural justice which forbids condemnation without opportunity for defense."

In the case of

Barron *vs.* Burnside, 121 U. S., 186,

this court held that the jurisdiction of the United States could not be taken away by a State statute requiring foreign corporations to stipulate that they would not remove cases to the Federal courts. The court (Mr. Justice Blatchford delivering the opinion) said:—

"As the Iowa statute makes the right to a permit "dependent upon the surrender by the foreign cor- "poration of a privilege secured to it by the Consti- "tution and laws of the United States, the statute "requiring the permit must be held to be void."

In the present case, if the New York statute is to be construed as authorizing a service upon a person who under the decisions of this court is not really its representative, then it amounts to a provision that if the corporation does business within the State, it shall submit to judgments against it without due process of law. This, it is submitted, is beyond the power of the State. The doctrine has been very admirably stated by the United States Circuit Court for the Middle District of Pennsylvania in the case of

Frawley *vs.* Penna. Casualty Co., 124 Fed. Rep., 259.

as follows:—

"The doctrine is thus authoritatively stated by "Mr. Justice Peckham in Conn. Life Ins. Co. *vs.* "Spratley, 172 U. S., 602: 'In a suit where no prop- "'erty of the corporation is within the State, and "'the judgment sought is a personal one, it is a "'material inquiry to ascertain whether the foreign "'corporation is engaged in doing business within "'the State; * * * and if so, the service of "'process must be upon some agent so far repre- "'senting the corporation in the State that he may "'properly be held, in law, an agent to receive such "'process in behalf of the corporation.' These "jurisdictional facts the State necessarily cannot "control, and it cannot, therefore, declare or pre- "scribe in advance what shall be taken as the "doing of business within its borders, nor what "shall constitute a sufficiently representative agency. "Both must be determined by the courts upon the "facts as they arise, according to the principles of law "which apply."

To briefly recapitulate it is submitted:—

First.—That while a foreign corporation may be amenable to suit in a State other than the State of its incorporation it is only so amenable when it really enters the other State and through its agents therein attempts to carry on its business there.

Second.—That the findings in the present case show that the corporation while endeavoring to induce customers from other States to come into Pennsylvania and deal with it there, never, in point of fact, carried on its business or any branch of it in New York.

If this question is decided in favor of the company the other questions become unimportant, but if it should be decided against the company then it is submitted.

Third.—That the cause of action did not arise in New York, and therefore the service was not authorized by the New York Code.

Fourth.—That the New York Code is to be interpreted as authorizing a service only on a director who, as such, is representing the company in New York.

Fifth.—That, irrespective of any interpretation of the New York Code, service on a director who was not representing the corporation in New York, who had no duties in New York and who transacted no business for the company in New York, was not such a service as would sustain jurisdiction in the Federal courts.

It is submitted, therefore, that the question certified should be answered in the negative.

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